IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HEATHER MCMILLAN NAKAI
404 King Farm Blvd. #02
Rockville, MD 20850
(240) 912-6956

Plaintiff

v.

SALLY JEWELL
in her official capacity as
Secretary
United States Department of the Interior
1849 C. Street NW
Washington, DC 20240

LAWRENCE ROBERTS
in his official capacity as
Acting Assistant Secretary - Indian Affairs
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

BRUCE MAYTUBBY
in his official capacity as
Regional Director
Eastern Region
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

UNITED STATES DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240,

Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTORY STATEMENT

1. Heather L. McMillan Nakai (Ms. McMillan Nakai) challenges an April 17, 2012 decision issued by the Secretary of the U.S. Department of Interior through her designee the Eastern Regional Office of the Bureau of Indian Affairs denying Ms. McMillan Nakai's request for verification of eligibility for Indian Preference in a manner that is arbitrary, capricious, not in accordance with the Indian Reorganization Act and its implementing regulations, and otherwise an abuse of discretion. The Secretary's decision denied Ms. McMillan Nakai verification of Indian Preference despite the fact that Ms. McMillan Nakai meets the standard of eligibility for Indian Preference, that she provided the Bureau of Indian Affairs ("BIA") with the specific federal records identified by the BIA as acceptable proof of eligibility for Indian Preference, and that she followed the procedure for acquiring that verification outlined by the BIA in its regulations and the accompanying form. The decision below is thus in violation of the Indian Reorganization Act, 25 U.S.C. § 472. Ms. McMillan Nakai therefore seeks declaratory and injunctive relief from the Secretary's refusal of service.

NATURE OF THE ACTION

2. Plaintiff seeks declaratory and injunctive relief pursuant to the Constitution and laws of the United States, including but not limited to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706. This action arises under federal law, including but not limited to the Indian Reorganization Act, 25 U.S.C § 461 et. seq.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331.

4. Venue is proper in this district under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 because a substantial part of the events giving rise to the claims asserted occurred in this district and because Defendants may be found here.

5. Ms. McMillan Nakai has the right to bring this action under 5 U.S.C. §§ 701-706 because Defendants have engaged in final agency action presenting an actual case or controversy for which Ms. McMillan Nakai is entitled to relief and because the United States has consented to suit.

THE PARTIES

6. Plaintiff Ms. McMillan Nakai is an individual entitled to rights by authority of the Indian Reorganization Act of 1934, (IRA), 25 U.S.C. § 461 et. seq. because she is an Indian to the degree required by the IRA and derived from tribes indigenous to the United States and whom the Department of Interior has determined are entitled to benefits authorized by the IRA.

7. Defendant Sally Jewell is the Secretary of the U.S. Department of the Interior ("DOI"). She acts through her designee the Acting Assistant Secretary - Indian Affairs, and is sued in her official capacity.

8. Defendant Lawrence Roberts is the Acting Assistant Secretary - Indian Affairs of the U.S. Department of the Interior. The Acting Assistant Secretary has responsibility for management of the Bureau of Indian Affairs ("BIA") and is sued in his official capacity.

9. Defendant Bruce Maytubby is the Eastern Regional Director - Bureau of Indian Affairs of the U.S. Department of the Interior. The Eastern Regional director has responsibility for verifying eligibility for Indian Preference for individual Indians residing within the Eastern Region, which includes the State of Maryland, where Ms. McMillan Nakai resides.

10. Defendant the U.S. Department of the Interior is an executive department of the United States and is headquartered at 1849 C Street NW, Washington, DC 20240.

FACTUAL BACKGROUND

I. The Present Dispute

11. Ms. McMillan Nakai is an Indian of more than one-half degree Indian blood derived from tribes indigenous to the United States, collectively the Siouan Indians of Robeson County.

12. In 1934, Congress passed the IRA providing rights, benefits, and privileges to all citizens of the United States who met the definition of "Indian" specifically including those people who were more than one-half degree of Indian blood derived from the tribes indigenous to the United States. Those benefits include the right to preference in employment. *See* 25 U.S.C. § 472 and 25 C.F.R. Part 5.

13. In 1935, Assistant Solicitor Felix Cohen determined that any individual Siouan Indian of Robeson County who was more than one-half degree of Indian blood was eligible for the benefits of the IRA. Exhibit 1.

14. Ms. McMillan Nakai filed BIA Form 4432, required by the BIA to apply for Indian preference, with the BIA on March 14, 2012, via facsimile and a hard copy along with secondary supporting documents via U.S. Mail to the Eastern Regional Office. Those secondary materials included U.S. census records for every individual ancestor from whom Ms. McMillan Nakai derives her Indian blood and indicated their names, ages, relationship to one another, Indian blood quantum, and tribal affiliation. Ms. McMillan Nakai also provided additional state records establishing her descent from those individuals. Exhibit 2.

15. On April 19, 2012, Tribal Government Specialist Chandra Joseph denied Ms. McMillan Nakai's request for verification of eligibility for Indian Preference for the stated reason that

"the Lumbee Indians are not a Federally recognized tribe; therefore, the Bureau of Indian Affairs does not have any records or information regarding the Lumbee Tribe to verify your asserted degree of blood." Exhibit 3.

II. Final Agency Action

16. On May 17, 2012, Ms. McMillan Nakai appealed the April 19, 2012 decision to the Eastern Region Director based on the grounds that the denial was arbitrary and capricious because it failed to consider the extensive materials submitted with Ms. McMillan Nakai's BIA Form 4432. Exhibit 4.

17. On June 04, 2012, Eastern Region Director Franklin Keel denied Ms. McMillan Nakai's request for verification of Indian Preference on the grounds that "Lumbee Indians do not constitute a federally recognized Tribe; therefore, the Bureau of Indian Affairs does not have any records of information regarding the Lumbee Tribe to verify your asserted degree of Indian blood." Exhibit 5.

18. On July 05, 2012, Ms. McMillan Nakai appealed the Eastern Region Director's decision to the Interior Board of Indian Appeals ("IBIA"). In the required Statement of Reasons, Ms. McMillan Nakai outlined how she had established via state and official records including conclusive census records, that she was more than one-half degree Indian blood quantum derived from tribes indigenous to the United States. She also outlined in detail how she derived her degree of Indian blood from Croatan and Cherokee ancestors. Exhibit 6.

19. On July 24, 2012, the Eastern Region Director provided the IBIA with an Agency Administrative Record pursuant to IBIA regulations at 43 C.F.R. § 4.335(a).

20. On August 16, 2012, Ms. McMillan filed an objection to the Administrative Record submitted by the Eastern Regional Director noting the BIA had included only 3 pages of the

more than 60 pages she submitted to support her claim, excluding all documents that document her ancestors as Croatan and Cherokee and the BIA's prior consistent decisions that they were Indians, identified as collectively the Siouan Indians of Robeson County. Exhibit 7.

21. On February 27, 2015, the IBIA affirmed the Region Director's decision that Ms. McMillan Nakai's is not entitled to Indian Preference. Exhibit 8.

COUNT I
(Declaratory and Injunctive Relief – Denial of Indian Preference in Violation of the Indian Reorganization Act)

22. Each of the foregoing allegations is incorporated herein by reference.

23. The Secretary lacked authority to deny of verification of Indian preference to Heather McMillan Nakai. Because Ms. McMillan Nakai has provided sufficient proof of her Indian blood quantum of more than one-half degree derived from tribes indigenous to the United States within the meaning of 25 U.S.C. § 479, the Secretary's failure to provide Ms. McMillan Nakai with verification of eligibility of Indian preference was arbitrary, capricious, contrary to law, and in excess of her statutory authority under 5 U.S.C. § 706(2).

24. By defining "Indian" as any person "of one-half or more Indian blood of tribes indigenous to the United States," 25 U.S.C. § 479, the IRA provides an unequivocal definition of which individual citizens of the United States are entitled to the benefits provided by the Indian Reorganization Act.

25. The Solicitor of the Department of Interior issued a memorandum that the Siouan Indians of Robeson County were entitled to the benefits provided by the Indian Reorganization Act of 1934 to the extent they were one-half degree Indian blood.

26. The evidence in the Administrative Record unequivocally demonstrates that Ms. McMillan Nakai is more than one-half degree Indian blood derived from the Siouan Indians of Robeson County whom the Department of Interior determined were entitled to the benefits of the Indian Reorganization Act. Therefor the Secretary's denial of verification of Indian preference violated the Indian Reorganization Act, 25 U.S.C § 479.

27. The Secretary's constantly changing justification for denying Ms. McMillan Nakai's request for verification of Indian preference demonstrates the arbitrary nature of the decision.

28. In 1975, the D.C. Circuit opined, in *Maynor* v. *Morton*, 501, F.2d 1254 at 1259 (1975), that the Secretary of Interior is "not at liberty to pick and choose among Congressional enactments. If he had two Acts upon the same subject, he could have given effect to both by simply recognizing that whatever rights... were not abrogated" by the Lumbee Act.

29. The Secretary here, as in *Maynor*, was not at liberty to pick and choose among Congressional enactments. Ms. McMillan Nakai is not seeking a declaration of eligibility for any benefits by virtue of her being a Lumbee Indian under the 1956 Act. She predicates her claim on the unquestioned proof of her Indian blood quantum provided to the Secretary in accordance with the regulations found at 25 C.F.R. Part 5 which is more than fifty percent blood, and therefore an Indian as defined in the IRA of 1934.

30. The Secretary's decision to deny Ms. McMillan Nakai's request for verification of Indian Preference is arbitrary and capricious and contrary to law because it fails to adhere to the IRA, 25 U.S.C. § 472 and the procedural and substantive requirements set forth in 25 C.F.R. Part 5 and the BIA's Form 4432. The Secretary did not consider the Administrative Record and relied on interpretations of the Lumbee Act that have already been considered by the DC Circuit and overturned.

REQUESTED RELIEF

WHEREFORE, Plaintiff request that the Court enter judgment as follows;

31. Declaring that the Secretary's decision to deny Ms. McMillan Nakai's request for verification of Indian Preference violates the IRA and associated regulations and ordering the Secretary to set aside her denial of Indian preference verification to Ms. McMillan Nakai and to immediately verify her Indian preference eligibility.
32. Declaring that the Department of Interior is required to provide benefits to individual Indians who may be impacted by the Lumbee Act if those individuals establish their eligibility without relying on the Lumbee Act.
33. Awarding Plaintiff costs, attorneys' fees, and other expenses of this litigation.
34. Providing any such other relief that the Court may deem proper.

Dated: July 22, 2016

Respectfully Submitted,

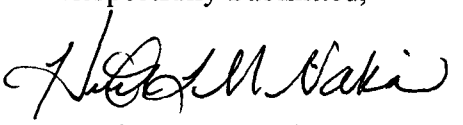

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EXHIBIT 1

(COPY)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington

April 8, 1935.

Memorandum for the
Commissioner of Indian Affairs:

Your memorandum of February 18 raises the question, with regard to the Siouan Indians of North Carolina, whether this group can organize under the Wheeler-Howard Act to receive a constitution and charter.

Clearly, this group is not a "recognized Indian tribe now under Federal jurisdiction", within the language of section 19 of the Wheeler Howard Act. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler-Howard Act only in so far as individual members may be of one-half or more Indian blood. Such members may not only participate in the educational benefits under section 11 of the Wheeler-Howard Act and in the Indian preference rights for Indian Service employment granted by section 12 of the Wheeler-Howard Act, but may also organize under sections 16 and 17 of the Wheeler-Howard Act if the Secretary of the Interior sees fit to establish for these eligible Indians a reservation. Such a reservation might be established either through the outright purchase of land by the Secretary of the Interior, under section 5 of the Wheeler-Howard Act, or by the relinquishment to the United States of land purchased by the Indians themselves, under the same section of the Wheeler-Howard Act, or by a combination of these two methods of acquisition. A reservation having been established, those residing thereon will be entitled to adopt a constitution and bylaws and to receive a charter of incorporation. Under section 19 of the Wheeler-Howard Act the "Indians residing on one reservation" may be recognized as a "tribe" for the purposes of the Wheeler-Howard Act regardless of their previous status.

In order to attain these benefits some such plan as the following would, I think, be necessary: A group of landless Siouan Indians of one-half blood or more, recommended by the Siouan Council for their agricultural ability and industry, and approved by the Commissioner of Indian Affairs, would purchase a suitable tract of land

and surrender title to the United States to be held in trust for the group. The land would, of course, become tax-exempt. The money needed for such purchase might be contributed in part through the generosity of several members of the Siouan Tribe and in part by the Indians who are to benefit from the project. The Indians chosen for the project would then adopt a suitable constitution and bylaws and receive a charter. The group might be designated as the "Siouan Indian Community of Lumber River." It would participate, along with other Indian groups, in the benefits of the Tribal Credit Fund, established under section 10 of the Wheeler-Howard Act. In the case of these Indians the fund could be used to finance the purchase of seed [illegible] agricultural machinery and the improvement of the land. Further-[illegible] cooperative marketing, the establishment of a cooperative store, [illegible] a cooperative dairy, might be financed by means of such credits. Such activities would make the project useful, as well as [illegible], to the entire Siouan Tribe.

[illegible] project, begun on a fairly small scale, would naturally [illegible] in membership and area if the cooperative endeavors [illegible] should prove successful. Provision for the adoption of [illegible] and the acquisition of further lands should be included [illegible] constitution of the group.

[illegible], I think that some such plan as that above sketched, [illegible] on a voluntary basis and requiring no initial out-[illegible] States, would prove suitable for many other non-[illegible] of Indians, and possibly for some reservation [illegible] reservation" in name only.

(Signed) Felix S. Cohen

Assistant Solicitor.

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UNITED STATES DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240,

Defendants

EXHIBIT 2

FORM BIA – 4432

OMB Control # 1076-0160
Expiration Date. 11/30/2014

VERIFICATION OF INDIAN PREFERENCE FOR EMPLOYMENT IN THE BUREAU OF INDIAN AFFAIRS AND THE INDIAN HEALTH SERVICE

Complete one of the categories as stated in the Instructions and submit this form with your application for Federal employment.

CATEGORY A - MEMBERS OF FEDERALLY-RECOGNIZED INDIAN TRIBES, BANDS OR COMMUNITIES
This is to certify that the person named below is a member of the tribe shown.

Full Name | Enrollment No | Date of Birth | Tribal Affiliation

I certify that the above information was taken from the official membership records of the _____ Tribe (or records maintained for the Tribe by the BIA) and acknowledge that falsification and misrepresentation of this information is punishable under Federal Law, 18 U.S.C. 1001.

Certification by Tribal Official:

Signature | Date

Print Name & Title of Tribal Official

And if required, verification by the BIA Official maintaining the official tribal rolls that the individual is listed on enrollment list maintained by the BIA at the request of the tribe.

Signature of BIA Official | Date

Name/Title | Agency

CATEGORY B - DESCENDANTS OF MEMBERS OF FEDERALLY-RECOGNIZED INDIAN TRIBES, BANDS OR COMMUNITIES WHO WERE RESIDING ON ANY INDIAN RESERVATION ON JUNE 1, 1934
I certify that the person named below has established to my satisfaction that he/she is a descendant of an enrolled member of the tribe named below and that he/she was living on an Indian reservation on June 1, 1934. The applicant's family history is outlined on the attached family history chart.

Full Name | Date of Birth

Reservation of Residence on June 1, 1934

Full Name of Ancestor & Tribal Affiliation

Title and source of records upon which this is based.

BIA Official | Date

Title | Agency

CATEGORY C - PERSONS WHO POSSESS AT LEAST ONE-HALF DEGREE INDIAN BLOOD DERIVED FROM TRIBES INDIGENOUS TO THE UNITED STATES.
I certify that I have reviewed the documentation to support the below listed individual's claim to possess at least one-half degree Indian blood. The applicant's family history is outlined on the attached family history chart and official records.

Heather Leticia McMillan Nakai | 05/23/1980 | 31/32 Cherokee, Creek, Tuscarora
Full Name | Date of Birth | Degree of Blood and Tribal Derivation

Title & Source of Records upon which this is based.

☐ Official Records of Tribal Affiliation & Blood Degree
☐ State or Academic Recognition of Indigenous Status

BIA Official | Date

Title | Agency

Heather L. McMillan Nakai
404 King Farm Blvd. #02
Rockville, MD 20850

Ms. Chandra Joseph
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214
Fax: (615) 564-6701

Dear Ms. Joseph:

I am writing to request that you review and certify my Form BIA-4432 based on Category C – Persons who possess at lease one-half Degree of Indian Blood Derived From Tribes Indigenous to the United States. This matter is urgent and I would appreciate you reviewing this matter as soon as possible.

You will find Form BIA-4432 OMB Control # 1076-0160 with my information filled in attached to this letter. I have also included:

(1) A copy of my tribal enrollment card;
(2) A certificate of Tribal enrollment including blood quantum dated 03/13/2012;
(3) My tribal enrollment chart including a family history chart;
(4) 1910 Census of the United States – Indian Population identifying Winston Carter as an Indian;
(5) A certificate of Death issues that the State of North Carolina for Winston Carter identifying his ethnicity as Indian;
(6) The United States Census for 1930 identifying Winston Carter and his son Brady Carter as Indian and as a full-blood;
(7) Robeson County Index to vital statistics showing Margaret Jane Carter, an Indian, as the child of Brady Carter and Marcella Locklear;
(8) 1910 Census of the United States – Indian Population identifying Effie Barton, John Barton, and Carrie Barton as Indians;
(9) 1900 Census of the United States – Indian Population identifying William Luther Jacobs as an Indian;
(10) Robeson County, N.C. Indexed Register of Marriages showing Brady Locklear and Polly Strickland as married in May of 1904 and identifying them both as Indians;
(11) 1910 Census of the United States – Indian Population identifying Brady and Polly Locklear as Indians;
(12) A United States Draft card for Brady Locklear, identifying him as an Indian and listing Polly Locklear as his point of contact.

(13) The 1930 United States Census listing Brady, Polly, and Marcella Locklear as Indians;
(14) The Robeson County Index to Vital Statistics listing Herbert McMillan as the son of Warren McMillan;
(15) Draft Registration card fro Warren Lincoln McMillan identifying his point of contract as Corneilla Locklear; (Warren L. McMillan had no birth certificate but Corneilla Locklear is listed as his mother in various other documents.)
(16) 1930 United States Census listing Cornelia [Corneilla] Locklear and Warren L Locklear [McMillan] aged 6, as Indians;
(17) United States Census of 1870 identifying Nathan McMillian [McMillan] as "Mulatto" the terms used to describe Indians in North Carolina in 1870;
(18) North Carolina Certificate of Death for Duncan McMillian [McMillan] as Indian and as the child of Nathan McMillian [McMillan] and Margaret Locklear [Revels].
(19) My North Carolina Marriage License;
(20) The Lumbee Tribal Enrollment Ordinance CLLO-2010-0121-01
(21) The State of North Carolina List of State Recognized Tribes and Organization as of 03/13/2012;
(22) January 20, 2010, Senate Report from the Committee on Indian Affairs; and
(23) Maynor v. Morton, 510 F.2d 1254 (D.C. Cir. 1975).

BIA Form 4432 Category C requires that I possess at least one-half degree Indian Blood derived from tribes indigenous to the United States. I have 31/32 degree of Indian Blood derived from tribes indigenous to the United States including the predecessors of the Lumbee Tribe who were historically identified by the State of North Carolina and the Federal Government as the Cheraw, Croatan, the Indians of Robeson County and the misnomer of the Cherokee Indians of Robeson County. I am asserting my eligibility for Indian preference based on my individual status as an Indian as allowed for by the Indian Reorganization of 1934.

My birth certificate, issued by the State of North Carolina, clearly indicates that my ethnicity is Indian. All of my education records from my years in North Carolina public and private schools clearly indicate that I am Indian and my first driver's license, issued by the State of North Carolina identified me as Indian. As you can see, the State of North Carolina has always recognized me as an Indian, descended from a tribe indigenous to the United States. History shows that the State of North Carolina and the Federal Government have always considered my ancestors to be Indian as well.

I have provided a family history chart and supporting documentation that clearly shows that the vast majority of my ancestors were Indians including the Federal census of the Indian populations for 1900/1910 and other sections of the Federal census for 1900/1910/1920/1930, along with other state and federal records designating my individual ancestors as Indian. I have also included other secondary sources that demonstrate that both United States Congress and the Indian Office have always considered my ancestors to be Indians and that fact supports the conclusion that I have at least one-half degree of Indian blood and in fact that my degree of Indian blood is 31/32.

As long as their have been any written records regarding my ancestors, they and I have been considered Indians, those people descended from Tribes indigenous to the United States, by the Federal Government, the State of North Carolina, and Robeson County in the State of North Carolina.

- In 1835, North Carolina specifically prohibited Indians, including my ancestors, from voting and other citizenship rights because they were Indians.

- In 1885, the State of North Carolina formally recognized my ancestors as Indians, descended from tribes indigenous to the United States and authorized separate schools for Indians.

- In 1888, the State of North Carolina restored Indians' citizenship, this included my ancestors.

- In 1912, the Indian Office, a federal agency, through a report of a study conducted on Robeson County Indian schools and recognized that students in Robeson County Indian schools could readily be classified as Indian.

- In March of 1913, Charles F. Peirce a Supervisor and Inspector of the United States Indian Service, affirmatively states that "The state of North Carolina has the largest number of Indians, it being home to...the Croatans who live largely in Robeson County in the south-eastern part of the state.

- In 1915, in response to a request by Congress to report the status and condition of the Indians of Robeson county, the agent from the Indian Office reported on the Indians and pointing out that they were primarily agricultural people, clearly using the term of "Indian" which has historically been reserved to annotate those individuals descended from a tribe indigenous to the United States.

- In 1933 anthropologist John R. Swanton studied the individuals who are the ancestors of and the current members of the Lumbee tribe, and concluded that they were descendants of the Cheraw, a tribe indigenous to the United States.

- Finally, in a January 20, 2010 report, the Senate Committee on Indian Affairs clearly states that the Federal Government and the State have long considered and in some respects established that the people now known collectively as the Lumbee Tribe are Indian.

The Federal Government has long recognized that the individual Indians in and around Robeson County were, and are, Indians. My ancestors have all been, or descended from, those individuals so recognized. Therefore, I am also an Indian for the purposes of establishing blood-quantum.

My parents, great-grand parents, and great-great grandparents have all been designated, by name as Indians as the attached documents show. My parents, Herbert McMillan and Margaret Jane Carter McMillan, were both Indians. Both of their birth certificates issued by the State of North Carolina clearly identify them and their parents as Indians. Further, during the segregation of North Carolina school systems both of my parents attended tribal schools because of their status as Indians and as required by segregation laws. These are the same schools that were studied in 1912 and 1915 by the Indian Office and the Indian Office clearly acknowledges that the school educated Indians exclusively.

In sum, I am an Indian who possesses at least one-half degree of Indian blood derived from tribes indigenous to the United States and as such, I am requesting that the Eastern Regional Office of the Bureau of Indian Affairs certify my BIA Form 4432 to verify my eligibility for Indian Preference. This matter is urgent since my current employer has recently instituted and Indian Preference policy and because I am applying for a position with the Indian Health Service that I am uniquely qualified for. Since the IHS has absolute preference, my application may not be considered without this form. Thank you for your time. If you have any questions, please feel free to call me at (910) 740-5862.

Sincerely,

Heather L. McMillan Nakai

3/21/2012

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Defendants

EXHIBIT 3

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Eastern Regional Office
545 Marriott Drive, Suite 700
Nashville, TN 37214

IN REPLY REFER TO
Tribal Government Services

APR 19 2012

Ms. Heather L. McMillan Nakai
404 King Farm Blvd. #02
Rockville, Maryland 20850

Dear Ms. McMillan Nakai:

This is in response to your letter that was received in this office on March 26, 2012. You requested a Verification of Indian Preference for Employment in the Bureau of Indian Affairs and the Indian Health Service, Form BIA-4432. The Indians in Robeson and adjoining counties in North Carolina were designated as Lumbee Indians by the Lumbee Act of June 7, 1956, 70 Stat. 255. Lumbee Indians do not constitute a federally recognized Tribe; therefore, the Bureau of Indian Affairs does not have any records of information regarding the Lumbee Tribe to verify your asserted degree of blood.

The Lumbee Act precludes the Bureau from extending any benefits to the Indians of Robeson and adjoining counties. Moreover, the Lumbee Act expressly provides that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." Consequently, the Indian preference provision of the Indian Reorganization Act, 25 U.S.C. § 472, is not applicable to Lumbee Indians. The case of *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975) held only that 22 individual Lumbee Indians, already certified as ½ or more Indian blood, did not lose that status and could receive benefits.

We are returning your information and enclosing a "Guide to Tracing Indian Ancestry" for your information.

Thank you for your interest in Indian Affairs.

Sincerely,

Tribal Government Specialist

Enclosure

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Defendants

EXHIBIT 4

Heather L. McMillan Nakai
404 King Farm Blvd. #02
Rockville, MD 20850
(910) 740-5862

May 17, 2012

Franklin Keel, Region Director
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214
FAX: (615) 564-6701

RE: NOTICE OF APPEAL – Heather McMillan Nakai Request for Indian Preference Verifications

Dear Mr. Keel:

I hereby appeal the decision by Chandra Joseph of the Eastern Regional Division of Tribal Government services that I am ineligible for Indian Preference which I received on April 26, 2012.

On March 14, 2012, I submitted my request for verification of my eligibility for Indian Preference based on Category C, one-half degree or more of Indian blood as provided for in the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. and BIA regulations at 25 C.F.R. Part 5. Along with the form for verification, I supplied documents, primarily United States Census records and a family history, demonstrating that I am more than one-half degree of Indian blood. In addition to the census records for approximately 4 generations of my family, I provided additional documents that document my parents' relationship to those individuals including vital records documents, death certificates and other state or federal government issued documents identifying the ethnicity and/or relationships of all person listed in the family history. .

Ms. Joseph's decision to deny my request for verification of Indian preference was not only incorrect, but arbitrary and capricious. According to Ms. Joseph's decision "Lumbee Indians do not constitute a federally recognized Tribe; therefore, the Bureau of Indian Affairs does not have any records of information regarding the Lumbee tribe to verify your asserted degree of blood." Ms. Joseph completely failed to address the extensive materials provided with my request supporting my asserted degree of Indian blood. As indicated in her decision letter, Ms. Joseph returned those materials to me with the decision so it is undeniable that she, and the Bureau, had access to and in fact, had in her immediate possession just such documents. Further, each of the records establishing the identity, tribal

relationship and familial relationship were Public Records and the Bureau could have easily verified their authenticity if that was in question.

Prior to submitting the request for verification of Indian Prefereice, I contacted the Bureau of Indian Affairs Region Office via telephone to get information about where to file my request. I was transferred to Ms. Joseph. I explained what I was looking for and in response to her question about what Tribe I was applying under I noted that I was not applying based on affiliation with a federally recognized tribe but rather I was applying under Category C, based on having on-half degree of Indian blood from a tribe indigenous to the United States as allowed for under the Indian Reorganization Act and the BIA regulations. Ms. Joseph again asked what tribe I was a member of and I explained that I was enrolled in the Lumbee Tribe of North Carolina but explicitly stated again, that I was applying, not based on my enrollment in the Lumbee Tribe, but rather under Category C. She responded by saying she "wouldn't touch a request from a Lumbee" and informed me that I needed to contact the headquarters of the Division of Tribal Government Services and its director, Dee Springer, for processing my request.

I immediately contacted Ms. Springer who then redirected me back to Ms. Joseph after informing me that "we've recently dealt with a Lumbee applicant and we denied that application but you can apply with the Region." When I informed her of Ms. Joseph's statement that she would not handle a request from a Lumbee, Ms. Joseph responded "she will do it, it's her job." I went back to Ms. Joseph who gave me the address but made it readily apparent she had made her mind up long before seeing or reviewing my application and supporting materials.

As will become clear in my statement of reasons, Ms. Joseph's decision was incorrect, and her analysis, or lack thereof, supporting the denial make the decision to deny my verification for Indian preference arbitrary and capricious. Therefore, I request that you review and overturn that decision. I'm including federal and state documents along with a "Statement of Reasons" as allowed for by BIA Regulations 25 C.F.R. § 2.10. Please let me know if I can provide you with any additional information to ensure that you have a complete record on which to base your decision. I certify that this appeal has been served on Ms. Chandra Joseph, the original decision maker, as well as Dee Springer, the Director of Tribal Government Services.

Sincerely,

Heather L. McMillan Nakai

Cc: Chandra Joseph, Eastern Region Tribal Government Services
Dee Springer, Director, Tribal Government Services

Attachments

STATEMENT OF REASONS

NOTICE OF APPEAL – Heather McMillan Nakai Verification of Indian Preference
May 17, 2012

Ms. Joseph's decision to deny my request for verification of Indian Preference was based on the lack of records held by the Bureau of Indian Affairs (BIA). Contrary to Ms. Joseph's analysis, the BIA did have substantial documents that trace my blood quantum back through several generations including census records that clearly indicate my ancestors' identity as Indian, including Tribal affiliation and degree of Indian Blood. Those records were provided in my original request and have been attached here. Further, below I have provided a written, step-by-step analysis of each branch of my family tree to further ease the burden on the BIA in verifying my eligibility for Indian preference.

1. Heather McMillan Nakai is an Indian with 31/32 degrees Indian Blood quantum derived from tribes indigenous to the United States through individual Indians recognized by the United States as such on a continuous basis.

2. Heather is therefore eligible for Indian preference under 5 C.F.R. § 5.2(c) and verification of that status on the verification of Indian Preference Form OMB Control # 1076-0160/BIA Form 4432 (BIA Form 4432) pursuant to Category C.

3. BIA Form 4432 states that to document that the applicant posses one-half degree Indian blood from a tribe indigenous to the United States, and in its directions states that "you [the applicant] must submit state or academic records that document this status, as well as official records that establish your degree of Indian blood, such as census records."

4. Heather McMillan Nakai can establish via state and official records that she has more than one-half degree Indian blood quantum from a tribe indigenous to the United States.

5. Heather McMillan Nakai should have received verification of her eligibility for Indian Preference under Category C.

6. That preference is based on genealogy as established via the attached family chart. Contrary to the assertion by Form 4432, a family chart is not provided by the BIA with the form on its website therefore a different form has been created and completed.

7. Heather McMillan Nakai is the daughter of Margaret Carter McMillan and Herbert McMillan (See Index to Vital Statistics-Births – Robeson County, North Carolina) (EXHIBIT A)

Margaret McMillan is 4/4 degree of Indian blood (EXHIBIT B)

8. Margaret Carter is the daughter of Braddy Carter and Marcella Carter.(Index to Vital Statistics –Births Robeson County, NC)

    a. Braddy Carter is 4/4 degree of Indian Blood [Cherokee] (See Census 1930)

    b. Braddy is the son of Winston and Bessie M. Chavis Carter (See Census of 1930
        i. Winston Carter is 4/4 degree of Indian Blood [Cherokee] (See Census of 1930)
        ii. Bessie M. Chavis Carter is 4/4 degree of Indian Blood [Cherokee] (See Census of 1930)

    c. Marcella Carter is 4/4 degree of Indian Blood (See Census 1930 line 27)
    d. Marcella is the daughter of Brady and Polly(Strickland) Locklear
        i. Brady Locklear is 4/4 degree of Indian Blood [Cherokee] (See Census of 1930)
        ii. Polly is 4/4 degree of Indian Blood [Cherokee] (See Census of 1930)

Herbert McMillan is more than 1/2 degree of Indian Blood (EXHIBIT C)

9. Herbert is the son Warren (Locklear) McMillan and Luellen (Jacobs) McMillan (See Index to Vital Statistics – Delayed Births – Robeson County, North Carolina)
    a. Warren (Locklear) McMillan is more than one-half Indian (See Census of 1930) [Parents unmarried and therefore the Census taker was unable to verify his full blood quantum]
        i. Cornelia Locklear is Indian [Cherokee] (see Census of 1930)
        ii. His father is not identified as such on the census records but is known to be Duncan McMillan (aka McMillian) also an Indian. (See North Carolina Certificate of Death)

    b. Louellen (Jacobs) McMillan is at least ¾ Indian Blood
        i. Louellen Jacobs McMillan is the daughter of Luther Jacobs and Effie (Barton) Jacobs. (See 15th Census of the United States [1930] Lines 73-76)
        ii. William Luther Jacobs is full degree of Indian Blood [Croatan] (See 12th Census of the United States Schedule No.1 – Population. Indian Population Line 10)
        iii. Effie (Barton Jacobs) is listed as ½ degree of Indian Blood (See 13th Census of the United States – 1910 – Indian Population line 19).

10. Margaret McMillan is (4/4 degree of Indian Blood) and Herbert McMillan is more than ½ degree of Indian Blood.

11. Therefore Heather McMillan is more than ¾ degree of Indian Blood

Ms. Joseph's decision provides commentary on the Lumbee Act, the application of the Indian Reorganization Act to Indians from Robeson County and the case of *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975) although she does not assert that her decision was in anyway based on the same. I believe that this discussion was simply dicta and does not need to be addressed in my Statement of Reason. However, I will address the incorrect analysis in Ms. Joseph's decision.

There is no question that prior to 1934 there were Indians, citizens of tribes indigenous to the United States, residing in Robeson County, North Carolina. There are numerous reports written by, or on behalf of, the United States Indian Service and it successor, the Bureau of Indian Affairs, that report on the Indians found in Robeson County, North Carolina. All of them have concluded that the Indians of Robeson County were Indians who are descended from tribes indigenous to the United States.[1]

The United States formally recognized and granted individual rights to Indians, regardless of their enrollment in federally recognized tribes, when the Congress passed the 1934 Indian Reorganization Act (IRA). The IRA definition of "Indian" includes "...all other persons of one-half or more Indian blood." *See* 25 U.S.C. § 479. This definition clearly includes any individual Indian of one-half degree or more of Indian blood. The IRA has further been implemented in regulations at 25 C.F.R. Part 5. Those regulations expressly provide for Indian preference to all individuals of one-half degree or more Indian blood derived from tribes indigenous to the United States. *See* 25 C.F.R. § 5.1(c).

The BIA has previously faced the question of whether individual Indians from Robeson County (Plaintiffs) were eligible for services under the IRA. In 1971, a group of Indians from Robeson County requested benefits under the IRA from the Department of Interior (DOI). The DOI denied that request citing to the Lumbee Act of 1956 (The Lumbee Act). The DOI alleged that the Lumbee Act implicitly repealed the IRA as it related to Indian in Robeson County based on the language of the Lumbee Act cited by Ms. Joseph's decision, namely "none of the statues of the United States which affect Indians because of their status as Indian shall be applicable to the Lumbee Indians". *See* Maynor v. Morton, 510 F. 2d 1254, 1257 (D.C. Cir 1975).[Exhibit E].

The Plaintiffs appealed the DOI's decision, and in a 1975 decision, the United States Court of Appeals for the District of Columbia Circuit held that the two statutes could, and should, be read together and by doing so it was clear that the rights secured under the IRA were not abrogated by the Lumbee Act. *Id.* at 1259. The Court reasoned that repeal

[1] See "The Croatan Indians of North Carolina", Charles F. Peirce, Supervisor and Inspector , United States Indian Service , Chilocco, Oklahoma (March, 1913)[Exhibit D] See also, S. Rep. No.116, 111th Cong. 2d Session.

by implication is disfavored and that in the instance of the Lumbee Act, Congress manifested no intent to take away any rights conferred on an individual by any previous legislation and that that the whole purpose of the cited language was to leave the rights of the Lumbee Indians unchanged. Further, the Court noted that the DOI, in attempting to interpret the Lumbee Act, failed to take into account the whole phrase, "Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians...." *Id.* at 1258. Based on the language in both the IRA and the Lumbee Act, the Court concluded that the individual Indians were entitled to the same rights they were entitled to prior the Lumbee Act.

The Court's finding in *Maynor v. Morton* is clear, the Lumbee Act does not, by its terms, repeal the rights granted to an individual under the IRA. The analysis of the Lumbee Act, the IRA and. *Maynor v. Morton* in Ms. Joseph's analysis overly relys on the fact that the Plaintiffs had received a specific certification provided to them by the BIA; the analysis entirely ignores the Court's reasoning for its holding.

The Court in *Maynor v. Morton* found that the Lumbee Act does not repeal the IRA. *Maynor v. Morton* which strongly supports the conclusion that where the IRA explicitly authorizes a benefit to an individual Indian, the Lumbee Act does not disgorge them of that right. In the instance at hand, where an individual Indian, regardless of enrollment or lack thereof, can establish that they are one-half degree of Indian blood from a Tribe indigenous to the United States, they continue to be eligible for Indian preference.

Like the plaintiff in *Maynor v. Morton*, I making my claim based on the Indian Reorganization Act of 1934. As an individual Indian of more than one-half degree of Indian blood from a tribe indigenous to the United States, I am entitled to Indian preference. There is no question that the Cherokee, Croatan, Cheraw or Siouan are all tribes indigenous to the United States. The individuals from which I derive my Indian blood were recognized as Indian before the IRA was passed and certainly before the Lumbee Act was passed by both the federal government and the State of North Carolina. As such, they were Indians entitled to the rights granted to Indians under the IRA prior to the Lumbee Act and, as held by the US Court of Appeals for the District of Columbia, the Lumbee Act did not terminate the individual rights granted to Indian in Robeson County under the IRA.

I hereby request that the Bureau of Indian Affairs complete my verification of Indian Preference in the most expedient way possible. I have lost a number of opportunities for employment in my chosen profession since filing my first request simply because I do not have an Indian preference form.

If you have any questions or if I you find that I need to provide additional information to form a complete records, please do not hesitate to contact me.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HEATHER MCMILLAN NAKAI
404 King Farm Blvd. #02
Rockville, MD 20850
(240) 912-6956

Plaintiff

v.

SALLY JEWELL
in her official capacity as
Secretary
United States Department of the Interior
1849 C. Street NW
Washington, DC 20240

LAWRENCE ROBERTS
in his official capacity as
Acting Assistant Secretary - Indian Affairs
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

BRUCE MAYTUBBY
in his official capacity as
Regional Director
Eastern Region
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

UNITED STATES
DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240,

Defendants

EXHIBIT 5

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Eastern Regional Office
545 Marriott Drive, Suite 700
Nashville, TN 37214

IN REPLY REFER TO
Tribal Government Services

JUN 0 4 2012

CERTIFIED RETURN RECEIPT REQUESTED – 7006 2150 0004 3350 1427

Ms. Heather L. McMillan Nakai
404 King Farm Blvd. #02
Rockville, Maryland 20850

Dear Ms. McMillan Nakai:

This is in response to your letter that was received in this office on May 22, 2012. You are appealing a letter dated April 19, 2012, where you were requesting a Verification of Indian Preference for Employment in the Bureau of Indian Affairs and the Indian Health Service, Form BIA-4432.

You provided documentation in support of your request that you are a member of the Lumbee Tribe of North Carolina and descended from tribal members with a degree of Indian blood of 31/32.

The Indians in Robeson and adjoining counties in North Carolina were designated as Lumbee Indians by the Lumbee Act of June 7, 1956, 70 Stat. 255. Lumbee Indians do not constitute a federally recognized Tribe; therefore, the Bureau of Indian Affairs does not have any records of information regarding the Lumbee Tribe to verify your asserted degree of blood.

Regulations of the Bureau extend a hiring preference "to persons of Indian descent who are . . . of one-half or more Indian blood of tribes indigenous to the United States." 25 C.F.R. § 5.1(c). This preference is not available to persons who base their Indian blood quantum on descent from Lumbee Indians.

The Lumbee Act precludes the Bureau from extending any benefits to the Indians of Robeson and adjoining counties. Moreover, the Lumbee Act expressly provides that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." Consequently, the Indian preference provisions of the Indian Reorganization Act (IRA), 25 U.S.C. § 472, and its regulations are not applicable to Lumbee Indians.

The case of *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975) held only that 22 individual Lumbee Indians, already certified as ½ or more Indian blood prior to the enactment of the Lumbee Act, did not lose that status and could receive benefits under te IRA. However, this decision made it perfectly clear that the benefits these 22 individuals received under the IRA would not be enjoyed by "a group of [their] neighbors [who] secured legislative recognition for the entire group of 'Lumbee Indians,' with the proviso that this recognition in itself would not entitle them to any benefits." *Id.* at 1259.

Accordingly, it is my decision that you are not entitled to verification of Indian preference by virtue of your membership in the Lumbee Tribe or your descent from Lumbee Indians, and the letter of April 19, 2012 to that effect is hereby sustained.

Appeal Rights

This decision may be appealed to the Interior Board of Indian Appeals, 801 North Quincy Street, MS-300-QC, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310 – 4.340. Your notice of appeal to the Board must be signed by you or your attorney and **must be mailed within 30 days of the date you receive this decision**. Your notice of appeal must be original; **no facsimile copies (faxes) will be accepted**. The notice of appeal should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your notice of appeal to (1) the Assistant Secretary – Indian Affairs, 4140 MIB, U.S. Department of the Interior, 1849 C Street, N.W., MS 4141, Washington, DC 20240, (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board must certify that you have sent copies to these parties. If you are not represented by an Attorney, you may request assistance from this office in the preparation of your appeal. If you file a notice of appeal, the Board will notify you of further appeal procedures. If a notice of appeal is not timely filed, this decision will become final for the Department of the Interior at the expiration of the thirty (30) day appeal period. A timely appeal will stay this decision. No extension of time can be granted for the filing of the notice of appeal.

This document is being provided to you through the U.S. mail with certified return receipt requested.

Sincerely,

Director, Eastern Region

Enclosure

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HEATHER MCMILLAN NAKAI
404 King Farm Blvd. #02
Rockville, MD 20850
(240) 912-6956

Plaintiff

v.

SALLY JEWELL
in her official capacity as
Secretary
United States Department of the Interior
1849 C. Street NW
Washington, DC 20240

LAWRENCE ROBERTS
in his official capacity as
Acting Assistant Secretary - Indian Affairs
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

BRUCE MAYTUBBY
in his official capacity as
Regional Director
Eastern Region
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

UNITED STATES DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240,

Defendants

EXHIBIT 6

Heather L. McMillan Nakai
404 King Farm Blvd. #02
Rockville, MD 20850
(910) 740-5862

July 5, 2012

Interior Board of Indian Appeals
801 North Quincy Street
MS-300-QC
Arlington, VA 22203

RE: NOTICE OF APPEAL TO THE INTERIOR BOARD OF INDIAN APPEALS – HEATHER MCMILLAN NAKAI REQUEST FOR INDIAN PREFERENCE VERIFICATION

I hereby appeal the decision by Franklin Keel, Director of the Eastern Region of the Bureau of Indian Affairs that I am ineligible for Indian Preference which I received on June 08, 2012. I certify that copies of this appeal have been simultaneously served on:

Dale Lavender, Acting Assistant Secretary of Indian Affairs;
Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Mr. Franklin Keel, Eastern Region Director for the Bureau of Indian Affairs
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

Ms. Chandra Joseph, Tribal Government Specialist, Eastern Region for the Bureau of Indian Affairs.
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214.

There are no other interested parties.

Please find enclosed my statement of reasons for this appeal and the Bureau of Indian Affairs responses to my request and appeal.

Sincerely,

Heather L. McMillan Nakai

enclosures

STATEMENT OF REASONS
INTERIOR BOARD OF INDIAN APPEALS, APPEAL OF DENIAL OF ELIGIBILITY FOR INDIAN PREFERENCE – HEATHER MCMILLAN NAKAI

I am eligible for Indian preference under the Indian Reorganization Act, 25 U.S.C. §472 and 5 C.F.R. § 5.2(c). To receive Indian Preference from various federal agencies, I am required to have verification of that status on the verification of Indian Preference Form OMB Control # 1076-0160/BIA Form 4432 (BIA Form 4432). I have requested that verification pursuant to Category C of BIA Form 4432, which provides for verification of an individual's status as an Indian of more than one-half degree of Indian blood quantum derived from tribes indigenous to the United States.

I am an Indian with more than one-half degree of Indian Blood derived from tribes indigenous to the United States through individual Indians, recognized by the United States as Indians, and recognized by the United States Government as Cheraw, Croatan or Cherokee, tribes that are undeniably indigenous to the United States.

BIA Form 4432 states that the applicant must document that the he or she possesses one-half degree Indian blood from a tribe indigenous to the United States. The directions for the form state that, "you [the applicant] must submit state or academic records that document this status, as well as official records that establish your degree of Indian blood, such as census records."

I can, and did, establish via state and official records, including conclusive census records that I am more than one-half degree Indian blood quantum derived from tribes indigenous to the United States. Those tribes are the Cheraw, Croatan, and Cherokee as identified on the original submission and even more explicitly identified in the appeal I provided to the BIA.

I should have received verification of my eligibility for Indian Preference under Category C of BIA Form 4432. The BIA failed to accurately apply the law to my request and arbitrarily and capriciously denied my request. I hereby request that the Interior Board of Indian Affairs reverse the Eastern Region's decision and order the BIA to provide verification of my eligibility for Indian Preference.

Background

On March 14, 2012, I submitted a request for verification of my eligibility for Indian Preference based on Category C, one-half degree or more of Indian blood as provided for in the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. and Bureau of Indian Affairs (BIA) regulations at 25 C.F.R. Part 5. I provided a form for verification clearly identifying my request under Category C and I supplied documents, primarily United States Census records and a family history, demonstrating that I am more than one-half degree of Indian blood. In addition to the census records, I provided additional documentation of my parents' relationship to those individuals including vital records

documents, death certificates and other state or federal government issued documents identifying the ethnicity, the tribal affiliation, and documented blood quantum of the individuals identified in the family history.

On April 19, 2012, Ms. Chandra Joseph, a Tribal Government Specialist in the Eastern Region –Tribal Government Services of the BIA, denied my request for verification of Indian preference. On May 22, 2012, the Department of the Interior Eastern Regional Director, Franklin Keel, received my appeal of Ms. Joseph's decision providing a more detailed step-by-step explanation of my family history chart and explicitly analyzing the blood quantum for each of my ancestors, clearly annotating their tribal affiliations including citations to the federal census records included.

Mr. Keel issued a decision to deny my request on June 4, 2012, and I received that response on June 8, 2012.

Both Ms. Joseph's denial and Mr. Keel's upholding of that denial were incorrect. The BIA, acting through the Eastern Region, failed to accurately apply the law to my request. Further, the BIA acted in an arbitrary and capricious manner by failing to review, analyze, or address any of the materials I provided before denying my request for verification of eligibility for Indian preference.

The BIA unilaterally changed my request for verification of Indian preference to a "Lumbee" request under Categories A and B.

I requested that the BIA verify my eligibility for Indian preference based on Category C - having one-half degree of Indian blood derived from tribes indigenous to the United States as allowed for under the Indian Reorganization Act and BIA regulations based on my ancestors having been Croatan, Cheraw, and Cherokee Indians.

Instead of responding to the request I made, the BIA, in an unbelievably egregious course of action, has unilaterally invented a new request for verification of Indian Preference and ascribed that request to me. The BIA, for reasons unknown, continually insists I'm basing my request for verification of Indian Preference under Categories A and B – (A) my enrollment in the Lumbee Tribe and (b) that I descend from Lumbee Tribal members despite my repeated written requests that clearly contradict that statement, I am only applying under Category C, being one-half degree of Indian blood.

Both of the decisions I received from the BIA were based on the BIA created request, a request for verification based on Categories A and/or B. As a result, neither of the decisions actually addressed my original request, namely a request to verify my eligibility for Indian preference based on my having a one-half degree or more of Indian blood derived from the Cheraw, Croatan, and Cherokee tribes.

Ms. Chandra Joseph responds to my request by addressing a Category A request.

Ms. Joseph's decision was incorrect because it did not respond to the request I made and instead responds to the BIA fact pattern, leading her to make an incorrect decision on my request.

According to Ms. Joseph her decision to refuse to verify my eligibility for Indian preference was because "Lumbee Indians do not constitute a federally recognized Tribe; therefore, the Bureau of Indian Affairs does not have any records of information regarding the Lumbee tribe to verify your asserted degree of blood." Ms. Joseph's reasoning was flawed from the outset.

First, I did not ask to have my degree of Indian blood verified as a member of the Lumbee Tribe (Category A), nor did I base my request on being a descendant of Lumbee Tribal members (Category B) so her reference to the Lumbee Tribe's status regarding recognition is irrelevant. In my original request, I requested that the Bureau of Indian Affairs verify my eligibility for Indian preference under Category C – One-half degree or more of Indian blood derived from tribes indigenous to the United States. Those tribes included the Cheraw, Croatan, and Cherokee Tribes. Ms. Joseph never addressed my descent from the people named in my request, who are clearly identified on the official documents provided as either Cheraw, Croatan or Cherokee, so she provides no response to my request and thereby makes an arbitrary and capricious decision.

Second, her assertion that the Bureau of Indian Affairs did not have any information to verify my asserted degree of Indian blood was patently false. As part of my original request, I provided Ms. Joseph with numerous pages of documentation to verify my degree of Indian blood, including United States Indian Census records and the general United States Census records which clearly indicate the Tribe and blood quantum for virtually all of my ancestors. Those tribes include the Cheraw, Croatan, and Cherokee. I provided a copy of a family history that clearly demonstrates my relationship to the individuals on the census records and provided North Carolina vital records to further confirm my relationship to those individuals. Ms. Joseph completely failed to address the extensive materials provided supporting my asserted degree of Indian blood derived from the Cheraw, Croatan, and Cherokee tribes. As indicated in her decision letter, Ms. Joseph did in fact have documents available to her because she returned those materials to me with her decision to deny my request for verification. It is therefore undeniable that she, and the BIA, had access to, and had in her possession, documents related to my ancestry and those documents to verify my claim that I am one-half degree or more of Indian blood derived from tribes indigenous to the Untied States.

Because I have clearly and accurately provided documentation establishing that I am one-half degree or more of Indian blood derived from tribes indigenous to the United States, the Cheraw, Croatan, and Cherokee, I should receive verification of my eligibility for Indian preference in compliance with the Indian Reorganization Act and BIA regulations. The Interior Board of Indian Appeals should therefore overturn Ms. Joseph's decision and find that I am eligible for Indian preference.

Mr. Franklin Keel replies to my appeal under Category C– as though it were a claim under Category A or Category B.

On May 22, 2012, the Department of the Interior Eastern Regional Director, Franklin Keel, received my appeal of Ms. Joseph's decision. Mr. Keel's response to that appeal was even more egregiously arbitrary and capricious. Mr. Keel's decision notes, "You provided documentation in support of your request that you are a member of the Lumbee Tribe of North Carolina and descended from tribal members with a degree of Indian blood of 31/32." His decision explicitly states and addresses a wholly unrelated request, attributed to me, for verification of Indian preference based on enrollment in the Lumbee Tribe, a Category A claim, and descended from, presumably Lumbee, tribal members, a Category B claim. The request he refers to was an inaccurate statement of my original request and appeal. Mr. Keel's response completely failed to address my verification request based on Category C and appeal despite my attempts to clarify the matter for the BIA by providing a step-by-step analysis of my lineage including the name of the ancestor, their tribal affiliation, their blood quantum, and a specific reference to the original, federal document that establishes each person's tribal affiliation and blood-quantum.

Mr. Keel's decision explains why a person who is claiming Indian preference based on their enrollment in the Lumbee Tribe is not eligible for Indian preference. He repeats and relies upon Ms. Joseph's original reasoning for refusing to verify my eligibility Indian preference because "the Bureau of Indian Affairs does not have any records of information" to verify my degree of Indian blood. In my appeal, I again provided extensive documentation regarding my ancestors and their degree of Indian Blood. Mr. Keel completely ignores those documents and it is egregious that he would continue to assert that the Bureau of Indian Affairs does not have records available. As he notes in his decision, "You have provided documentation...." If I provided documentation, it is impossible that he did not have documentation available and where the documentation provided clearly identifies my ancestors, their tribal affiliation, and their degree of Indian blood, his reasoning is wholly unsustainable.

Because I have provided official federal records and other North Carolina issued documentation establishing that I am one-half degree or more of Indian blood derived from tribes indigenous to the United States, the Cheraw, Croatan, and Cherokee, I should receive verification of my eligibility for Indian preference. The Interior Board of Indian Appeals should therefore overturn Mr. Keel's decision and find that I am eligible for Indian preference.

BIA Bias

I believe that the BIA Eastern Region office has been wholly unable to undertake an objective review of the facts of my request and has thus unreasonably and contrary to the law, refused to verify my eligibility for Indian preference. The BIA, through Ms. Joseph, insisted that I identify my tribal enrollment and then used that enrollment to unreasonably

deny my request for verification of my eligibility for Indian Preference. I believe that the BIA Eastern Regional Office has shown extreme bias towards me because of my tribal enrollment, has used my enrollment to deny my eligibility and, as a result, has engaged in egregiously arbitrary and capricious behavior.

Prior to submitting the request for verification of Indian Preference, I contacted the Bureau of Indian Affairs Eastern Region Office via telephone to get information about where to file my request for verification of Indian preference. I was transferred to Ms. Joseph. I explained that I was looking for an address to send my verification of Indian preference form. Ms. Joseph insistently and repeatedly refused to answer my question until I identified what tribe I was enrolled in. I repeatedly stated that I was not applying based on affiliation with a federally recognized tribe but rather I was applying under Category C, based on having one-half degree of Indian blood from a tribe indigenous to the United States as allowed for under the Indian Reorganization Act and the BIA regulations. Ms. Joseph was not satisfied so I was forced to explain my political status, specifically, that I was enrolled in the Lumbee Tribe of North Carolina. I again repeated that regardless of my enrollment, under Category C – having one-half degree of Indian blood derived from tribes, other than the Lumbee Tribe, indigenous to the United States. She responded by saying she "wouldn't touch a request from a Lumbee" and informed me that I needed to contact the headquarters of the Division of Tribal Government Services and its director, Dee Springer, for processing my request.

I immediately contacted Ms. Springer who then redirected me back to Ms. Joseph after informing me that "we've recently dealt with a Lumbee applicant and we denied that application" but noted that I could "try" to apply with the Region. When I informed her of Ms. Joseph's statement that she would not handle a request from a Lumbee, Ms. Springer responded "she will do it, it's her job." I went back to Ms. Joseph who gave me the address but made it readily apparent she had made her mind up that I would not receive verification of Indian preference. Ms. Joseph has made it clear that she is unable or unwilling to objectively review a request from a person who is affiliated with the Lumbee Tribe in any way, despite their eligibility for Indian preference based on factors other than that affiliation. Mr. Keel has continued that pattern of arbitrary and capricious action and their continued refusal to consider and respond to my request in its true form, including the documentation I provided, is egregious. The Interior Board of Indian Appeals should overturn those decisions to rectify the BIA's arbitrary and capricious behavior and their failure to apply the law in this matter.

In both my appeal and my original request, I did provide a family history chart from the Lumbee Tribe, simply because the BIA Form 4432 requires a family history chart but does not provide one; contrary to the instructions from the BIA Form 4432 which clearly state that there would be a form provided. The family history chart does reference me by name but as further proof that the chart was my family history and not that of someone else, I included a copy of my enrollment card which includes a unique identifier that matches the unique identifier on the chart. Had the BIA provided a family history chart, I would simply have provided that chart and a copy of my driver's license. In order, to make my appeal more clear, I refrained from including my Lumbee tribal enrollment card, hoping

that that would allow Mr. Keel to review and respond to my request accurately. That proved to be of no use.

Conclusion

I can clearly establish my eligibility for Indian preference based on deriving my Indian blood from tribes indigenous to the United States including the Cheraw, Croatan, and Cherokee tribes. The BIA has been overly and unduly focused on my Lumbee enrollment. I ask that the Interior Board of Indian Appeal consider my request without bias and find that I am eligible for Indian preference and order that my BIA Form 4432 be completed.

Sincerely,

Heather L. McMillan Nakai

Cc: Dale Lavender, Acting Assistant Secretary of Indian Affairs
Franklin Keel, Eastern Region Director of the Bureau of Indian Affairs
Chandra Joseph, Eastern Region Tribal Government Services

Attachments

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HEATHER MCMILLAN NAKAI
404 King Farm Blvd. #02
Rockville, MD 20850
(240) 912-6956

Plaintiff

v.

SALLY JEWELL
in her official capacity as
Secretary
United States Department of the Interior
1849 C. Street NW
Washington, DC 20240

LAWRENCE ROBERTS
in his official capacity as
Acting Assistant Secretary - Indian Affairs
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

BRUCE MAYTUBBY
in his official capacity as
Regional Director
Eastern Region
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

UNITED STATES
DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240,

Defendants

EXHIBIT 7

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

HEATHER L. MCMILLAN NAKAI Appellant, v. Eastern Regional Director, Bureau of Indian Affairs, Appellee.	)))))))))	APPELLANT'S OBJECTION TO THE RECORD AND REQUEST FOR REVISED BRIEFING SCHEDULE Docket No. IBIA 12-136

Heather L. McMillan Nakai (Ms. McMillan Nakai), Appellant, hereby objects to the administrative record in the above titled matter pursuant to 43 C.F.R. § 4.336. Ms. McMillan Nakai respectfully requests that the Interior Board of Indian Appeals (Board) require the Eastern Regional Director (Regional Director) to submit a complete record to the Board. Ms. McMillan Nakai further requests that the Board issue a revised briefing schedule to accord her the originally allotted time to prepare a brief that addresses both the appeal and the full and complete administrative record.

I. Legal Standards

The procedural regulations governing administrative appeals to the Board state that, "Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of...all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based...." 43 C.F.R. § 4.335(a).

An "appellant" is defined as "an interested party who files an appeal. 25 C.F.R. § 2.2 incorporated by 43 C.F.R. § 4.330.

Further, the scope of review for an appeal to the Board is limited to "those issues that were before the...BIA official on review." 43 C.F.R. § 4.318.

Finally, the regulations provide, "A notice of docketing shall be sent to all interested parties...upon receipt of the administrative record." 43 C.F.R §4.336.

III. Discussion

The July 17, 2012 Pre-Docketing Notice required the Regional Director to assemble and transmit the administrative record in accordance with 43 C.F.R. § 4.335.

To comply with the Board's request, the Regional Director should have supplied the Board with all original documents and all supplemental documents submitted by Ms. McMillan Nakai as an interested party. 43 C.F.R. §§ 4.330 and 4.335; 25 C.F.R. § 2.2.

On March 14, 2012, Appellant submitted a request for verification of eligibility for Indian Preference based on Category C, one-half degree or more of Indian blood, as provided for in the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. and Bureau of Indian Affairs (BIA) regulations at 25 C.F.R. Part 5. (A.R .Tab 7). That request included approximately 60 pages of documents supporting her claim that she was more than one-half degree of Indian Blood.

The Regional Director omitted all the documents that evidence Ms. McMillan Nakai's eligibility for Indian Preference under Category C of BIA Form 4432, filed in the original request from the administrative record, including:

(1) Primary federal and state documents that conclusively identify the tribal affiliation and documented blood quantum of the individuals from whom Ms. McMillan Nakai derives her degree of Indian Blood.

(2) Federal documents expressing the positions of the United States on the identity of the Indians in Robeson County, North Carolina. .

(3) Other documents related to the identification of Ms. McMillan Nakai's ancestors as Indians by the State of North Carolina.

It is important that the complete original submission be submitted so that the Board may accurately review the issue that was before the BIA in the matter on appeal and so Ms. McMillan Nakai may provide a brief that properly addresses a full and complete record.

IV. Conclusion

The Regional Director has failed to provide the Board with a complete administrative record for Ms. McMillan Nakai's appeal. Ms. McMillan Nakai requests that the Board require the Regional Director to provide a complete administrative record and grant her a revised briefing schedule to accord her the originally allotted time to prepare a brief that addresses both the appeal and the full and complete administrative record.

Heather L. McMillan Nakai
Appellant

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

HEATHER L. MCMILLAN NAKAI Appellant, v. Eastern Regional Director, Bureau of Indian Affairs, Appellee.	)))))))))	APPELLANT'S OBJECTION TO THE RECORD AND REQUEST FOR REVISED BRIEFING SCHEDULE Docket No. IBIA 12-136

Certificate of Service

I hereby certify that Appellant's Objection To The Record and Request For Revised Briefing Schedule has been served via U.S. Mail, return receipt requested, on this 16th day of August 2012 to:

Mr. Franklin Keel, Eastern Region Director
Eastern Regional Office, BIA
545 Marriott Drive, Suite 700
Nashville, TN 37214.

Ms. Chandra Joseph, Tribal Government Specialist,
Eastern Regional Office, BIA
545 Marriott Drive, Suite 700
Nashville, TN 37214.

Southeast Regional Solicitor, For Appellee
Office of the Solicitor
U.S. Department of the Interior
Richard B. Russell Federal Bldg.
75 Spring Street, SW, Suite 304
Atlanta, GA 30303

United States Department of the Interior
Interior Board of Indian Appeals

Heather L. McMillan Nakai, Appellant

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HEATHER MCMILLAN NAKAI
404 King Farm Blvd. #02
Rockville, MD 20850
(240) 912-6956

Plaintiff

v.

SALLY JEWELL
in her official capacity as
Secretary
United States Department of the Interior
1849 C. Street NW
Washington, DC 20240

LAWRENCE ROBERTS
in his official capacity as
Acting Assistant Secretary - Indian Affairs
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BRUCE MAYTUBBY
in his official capacity as
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Eastern Region
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

UNITED STATES
DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240,

Defendants

EXHIBIT 8

INTERIOR BOARD OF INDIAN APPEALS

Heather L. McMillan Nakai v. Eastern Regional Director, Bureau of Indian Affairs

60 IBIA 64 (02/27/2015)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

HEATHER L. MCMILLAN NAKAI, Appellant,	)	Order Affirming Decision
v.	)	
	)	Docket No. IBIA 12-136
EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	February 27, 2015

Heather L. McMillan Nakai (Appellant) appealed to the Board of Indian Appeals (Board) from a June 4, 2012, decision (Decision) of the Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director denied Appellant's request for a verification of Indian preference for employment in BIA and the Indian Health Service. *See* 25 C.F.R. Part 5. Appellant sought verification of Indian preference as a person who is "of one-half or more Indian blood of tribes indigenous to the United States." *Id.* § 5.1(c); *see* Indian Reorganization Act (IRA) § 19, 48 Stat. 984, 988, codified at 25 U.S.C. § 479 ("Indian" includes "persons of one-half or more Indian blood"). Appellant contends that she is 31/32 Indian blood derived from the Cherokee, Croatan, and Cheraw tribes. Descendants of those and other tribes who were living in Robeson and adjoining counties in North Carolina, and who were historically referred to as the Siouan Indians of Robeson County, were designated by Congress in the 1956 Lumbee Act as the "Lumbee Indians of North Carolina."[1]

Appellant is a Lumbee Indian, and the Regional Director concluded that the Lumbee Act precludes Appellant from claiming Indian preference based on ancestry from tribes whose descendants are Lumbee Indians because the Act states that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." Lumbee Act § 1, 70 Stat. at 255. Appellant contends that her status as a Lumbee is irrelevant to the determination of her qualification for Indian preference because her claim is separately and independently based on descent from the

[1] *An Act Relating to the Lumbee Indians of North Carolina*, Pub. L. No. 84-570, 70 Stat. 254 (1956) ("Lumbee Act" or "Act").

Siouan Indians of Robeson County, who after enactment of the IRA were recognized as eligible for benefits as Indians if they could establish one-half or more Indian blood.

We affirm the Regional Director. We accept, for purposes of our decision, that Appellant meets the requirements of 25 C.F.R. § 5.1(c) by having one-half or more Indian blood collectively derived from tribes indigenous to the United States. But we disagree with Appellant about the effect of the Lumbee Act. The fact that Appellant does not rely on her membership in the Lumbee Tribe does not mean that her status as a Lumbee Indian, which is derived from her ancestry, is irrelevant. When Congress precluded the applicability to Lumbee Indians of Federal statutes affecting Indians because of their status as Indians, it prevented Appellant from obtaining rights that she might otherwise have obtained as an "Indian" under Federal law, including "Indian" status for purposes of Indian preference.

Background

I. Appellant's Ancestry

Appellant was born in Robeson County, North Carolina, as were her father and mother, who were born in 1946 and 1949, respectively. Notice of Appeal, May 17, 2012, Ex. A, at 1 (unnumbered) (Index to Vital Statistics – Births – Robeson County, N.C. (Appellant)); Ex. B, at 1 (unnumbered) (Index to Vital Statistics – Births – Robeson County, N.C. (Appellant's mother)); and Ex. C, at 1 (unnumbered) (Index to Vital Statistics – Births – Robeson County, N.C. (Appellant's father)) (Administrative Record (AR) Tab 5). Appellant contends that her mother was 4/4 degree Indian blood, and that her father was at least 1/2 degree Indian blood, based on information contained in U.S. Census records for Robeson County. *See* Census Records (various) (AR Tab 5). Thus, according to Appellant, she is at least 3/4 Indian blood, and she contends that the correct figure is 31/32. Appellant claims all of her Indian blood quantum from her parents and ancestors who lived in Robeson County, North Carolina, and claims that her blood quantum is derived from the Cheraw, Croatan, and Cherokee tribes.

II. The Lumbee Indians

The term "Lumbee Indian" collectively refers to the descendants of several Indian tribes, mainly the historic Cheraw and related Siouan-speaking tribes, who settled near the Lumbee River in Robeson County in southeastern North Carolina. *See* S. Rep. No. 112-200, at 4 (2012); S. Rep. No. 108-213, at 3 (2003). The Lumbee also claim descent from remnants of early colonists. Lumbee Act § 1; *see* S. Rep. No. 112-200, at 4 (believed to be descendants of the lost Raleigh colony); *Relating to the Lumbee Indians of North Carolina: Hearing on H.R. 4656 Before the Subcomm. on Indian Affairs*, 84th Cong. 12-13 (1955) ("*Hearing on H.R. 4656*") (testimony of Rev. D.F. Lowery) (admixture of seven tribes and

intermarried with the first colonists). Over the years, the Indians of Robeson County have been called Croatan, Siouan, Cherokee, and Cheraw Indians. S. Rep. No. 112-200, at 4. According to a 2012 U.S. Senate Report recommending legislation to extend Federal recognition to the Lumbee Tribe of North Carolina, the "complex origins" of the Lumbee prompted past administrations to oppose such recognition. *Id.* at 5.

In a 1951 referendum, the name "Lumbee Indians of North Carolina" was adopted by the Indians of Robeson County, and in 1953 the State of North Carolina recognized them as "Lumbee Indians."[2] *Id.* The Lumbee Indians then petitioned Congress for Federal recognition of the name "Lumbee" as the official designation of the Indians of Robeson County. *Id.*

At hearings held in 1955 on proposed legislation to confer the designation, the sponsor explained that the purpose of the act was to give the Lumbee Indians "a name that would have . . . some significance," and noted that they did not seek Federal recognition or benefits at that time. *Hearing on H.R. 4656* at 7 (remarks of Rep. F. Ertel Carlyle). The Department of the Interior (Department) nevertheless opposed the legislation on the grounds that the proposed bill would lead to an "obligation to furnish . . . services that are furnished to the citizens of this country who are recognized by the Congress as Indians." H.R. Rep. No. 84-1654, at 2 (1956) (Statement of the Department). The Department objected to the "imposition of additional obligations on the Federal Government or in placing additional persons of Indian blood under the jurisdiction of [the] Department." *Id.*[3] The Department argued that if the bill were to pass, "it should be amended to indicate clearly that it does not make [Lumbee Indians] eligible for services provided through the Bureau of Indian Affairs to other Indians." *Id.*

The Lumbee Act was enacted on June 7, 1956. Lumbee Act, 70 Stat. 254 (1956). Congress recognized that the Indians of Robeson County "are descendants of that once large and prosperous tribe which occupied lands along the Lumbee River" during the early periods of European settlement. *Id.* at 254-55. The Act provided that "[t]he Indians now residing in Robeson and adjoining counties . . . and claiming joint descent from remnants of early American colonists and certain tribes of Indians originally inhabiting the coastal

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[2] Between 1913 and 1953, the State recognized them as the "Cherokee Indians of Robeson County." The Cherokee are among the seven different tribes from which the Lumbees claim descent, but the tribes living in eastern North Carolina apparently did not associate with the Cherokee living in the mountains of western North Carolina. *Hearing on H.R. 4656* at 12-13 (testimony of Rev. D.F. Lowery); S. Rep. No. 112-200, at 4.

[3] The 1950s marked an era of Federal "termination" policies toward Indian tribes.

regions of North Carolina, shall . . . be known and designated as Lumbee Indians of North Carolina." *Id.* at 255.

To address the Department's objections, language was inserted stating that "[n]othing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." *Id.*

III. Indian Preference

Several Federal statutes, including the IRA, include a preference for hiring Indians for certain Federal employment. *See* 25 U.S.C. § 472. The implementing regulations provide that "preference will be extended to persons of Indian descent" who fall within one of five categories, including, as relevant here, individuals "of one-half or more Indian blood of tribes indigenous to the United States."[4] 25 C.F.R. § 5.1(c). Appellant applied for verification of Indian preference from the BIA Eastern Regional Office based on being one-half degree or more Indian blood descended from the tribes historically identified as "the Cheraw, Croatan, the Indians of Robeson County and the misnomer of the Cherokee Indians of Robeson County."[5] Letter from Appellant to BIA, Mar. 21, 2012, at 2 (AR Tab 7). In support of her application, Appellant attached copies of U.S. Census records and state vital records, which identify her ancestors as Indian. *Id.* at 1-2; *see* Attachments to AR Tab 5.

A Tribal Government Specialist in BIA's Eastern Regional Office responded to Appellant's application, noting first that the Lumbee Indians are not a Federally recognized tribe, and stating that therefore BIA does not have records regarding the Lumbee to verify the degree of blood quantum claimed by Appellant. Letter from Joseph to Appellant, Apr. 19, 2012 (AR Tab 6).[6] The Tribal Government Specialist noted that the Indians of

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[4] The other categories are members of Federally recognized Indian tribes; descendants of such members who were, on June 1, 1934, residing within the present boundaries of an Indian reservation; Eskimos and other aboriginal people of Alaska; and certain Osage Indians. 25 C.F.R. § 5.1(a)-(b), (d)-(e).

[5] The application form filled out by Appellant identifies the tribes from which she claims descent as Cheraw, Croatan, and Tuscorora. Verification of Indian Preference for Employment, Form BIA – 4432 (AR Tab 8).

[6] The census records submitted by Appellant are barely legible, but do not appear to indicate blood quantum.

Robeson and adjoining counties in North Carolina were designated as Lumbee Indians by the Lumbee Act, and stated that the Lumbee Act precluded BIA from extending benefits to Lumbee Indians, including Indian preference under the IRA. *Id.*

Appellant appealed that determination to the Regional Director, arguing that the Tribal Government Specialist had misinterpreted her application for Indian preference by focusing on her status and enrollment as a Lumbee Indian, which Appellant contended were irrelevant to the basis upon which she sought Indian preference—her one-half or more Indian blood derived from the Cheraw, Croatan and Cherokee Tribes. Notice of Appeal, May 17, 2012, at 1 (AR Tab 5). Appellant argued that the Tribal Government Specialist had failed to address the documentation she provided in support of her claim of blood quantum eligibility for Indian preference, and suggested that BIA bias against members of the Lumbee Tribe may have led to the arbitrary and capricious denial of her application. *Id.* at 1-2.

The Regional Director affirmed the Tribal Government Specialist's determination that Appellant is ineligible for Indian preference. Letter from Regional Director to Appellant, June 4, 2012, at 1 (unnumbered) (Decision) (AR Tab 4). The Regional Director also interpreted the Lumbee Act as prohibiting BIA from extending Federal benefits to Lumbee Indians, finding that Indian preference is "not available to persons who base their Indian blood quantum on descent from Lumbee Indians." *Id.*

The Regional Director acknowledged that a Federal court decision, *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975) ("*Maynor I*"), had restored Federal benefits to the 22 Lumbee plaintiffs in that case. *Id.* at 2 (unnumbered). But the Regional Director construed *Maynor I* as limited in applicability to those 22 plaintiffs, who had been certified as "Indian" under the IRA prior to enactment of the Lumbee Act, and whom the court held had not been divested of their status and rights by the Lumbee Act. *Id.* The Regional Director concluded that Appellant is not entitled to verification of Indian preference "by virtue of your membership in the Lumbee Tribe or your descent from Lumbee Indians." *Id.*

Appellant appealed to the Board. Notice of Appeal, July 5, 2012 (AR Tab 3). Appellant argues that BIA mistakenly considered her enrollment and status as a Lumbee Indian, which she contends are irrelevant to satisfying § 5.1(c) and establishing eligibility for IRA benefits. Opening Brief (Br.), Nov. 15, 2012, at 5-8, 11. Appellant contends that the Lumbee Act does not preclude her eligibility for employment preference based on criteria other than her Lumbee enrollment, because the purpose of the Lumbee Act was only to give a collective name to the various Indian tribes of Robeson County, and it did not affect the benefits available to such Indians through prior legislation. *Id.* at 17; Reply Br., Jan. 14, 2013, at 11. According to Appellant, the last clause of the Lumbee Act—

"none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians"—was only meant to make clear that the Lumbee Act itself did not make Lumbee Indians eligible for Federal services or entitle them to Federal benefits. Opening Br. at 16. Appellant contends that her blood quantum as derived from the historical Cheraw, Croatan, and Cherokee tribes in Robeson County is "undisputed," and that because she claims eligibility for Indian preference based on her blood quantum pursuant to 25 C.F.R. § 5.1(c), not based on her membership in the Lumbee Tribe, she qualifies for Indian preference. *Id.* at 1, 3-4.

The Regional Director filed an answer brief, and Appellant filed a reply brief.

Discussion

We affirm the Decision because Appellant's status as a Lumbee Indian cannot be distinguished from her descent from the Indian tribes of Robeson County, whom Congress designated as Lumbee Indians. The fact that Appellant does not claim Indian preference based upon her membership in the Lumbee Tribe does not mean that her status as a Lumbee Indian—conferred by Congress—is irrelevant to determining her eligibility for Indian preference.[7]

The Lumbee Act declared that:

> the Indians now residing in Robeson and adjoining counties of North Carolina, . . . claiming joint descent from remnants of early American colonists and certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after the ratification of this Act, be known and designated as Lumbee Indians of North Carolina.

70 Stat. at 255. The Act expressly provided that the Indians designated as Lumbee Indians "shall continue to enjoy all rights, privileges, and immunities enjoyed" as citizens of North Carolina and the United States "as they enjoyed before the enactment of this Act." *Id.* The Act also made clear that it did not "make such Indians eligible for any services performed by the United States for Indians because of their status as Indians." *Id.*

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[7] We assume, for purposes of our decision, that Appellant can satisfy the language of 25 C.F.R. § 5.1(c) of having more than one-half Indian blood of tribes indigenous to the United States. We note, however, that Appellant apparently interprets census records identifying her ancestors as "Indian" as evidence that they were full-blood Indian.

Had Congress stopped there, Appellant might well fare differently, or at least this case apparently would rest on the evidentiary issue we need not address—the sufficiency of Appellant's proof of her Indian blood quantum. But Congress continued, in the Lumbee Act, by providing that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians." *Id.*

We conclude that this language is dispositive. Appellant, by virtue of her descent from the Indians of Robeson and adjoining counties in North Carolina, is a Lumbee Indian, and she is enrolled in the Lumbee Tribe. The language of the Lumbee Act states that none of the Federal statutes that affect Indians because of their status as Indians—here, the IRA and Indian preference statutes—shall be applicable to Lumbee Indians. For Appellant to claim more than one-half Indian blood from the historical tribes whose descendants were later collectively designated Lumbee Indians does not allow her to escape the effect of the Act.

Appellant contends that *Maynor I* was not limited to the 22 plaintiffs, and that it stands for the proposition that the Lumbee Act did not affect the eligibility of Lumbee Indians for Federal benefits under independent, prior legislation, such as the IRA. Opening Br. at 16-17. According to Appellant, *Maynor I* held that the Lumbee Act did not repeal the IRA, and her half-blood status derived from the historical predecessor tribes of the Lumbee allows us to ignore her status as a Lumbee and find that she can independently obtain rights under the IRA as a half-blood Indian. *Id.* at 17.

Appellant reads *Maynor I* too broadly. In *Maynor I*, the plaintiffs were Lumbee Indians who, following enactment of the IRA, had petitioned the Secretary for recognition as persons of one-half degree or more Indian blood, and who were certified in 1938 by BIA as being Indians "entitled to benefits established by the [IRA]." 510 F.2d at 1256. After the Lumbee Act was enacted in 1956, however, the Department took the position that those individuals were no longer eligible for benefits under the IRA. *Id.* at 1257. They sued, arguing that the Lumbee Act could not take away rights previously conferred on them prior to its passage. The Court found that "Congress was very careful [in the Lumbee Act] not to confer *by this legislation* any special benefits on these people so designated as Lumbee Indians." *Id.* at 1258. But the Court also found "nothing in the background of the Lumbee Act . . . which would indicate that Congress had any desire to take away any rights from persons . . . who may have been granted such rights by prior legislation." *Id.* The Court concluded that "whatever rights were acquired by [the plaintiffs] who were certified by the Department . . . in 1938 as 'Indians' under the IRA . . . were not abrogated" by the passage of the Lumbee Act. *Id.* at 1259.

Arguably, as the Regional Director concluded, *Maynor I* was limited in applicability to the 22 plaintiffs involved in that case, as suggested by a subsequent court decision. *See*

Roy Maynor v. United States, 2005 U.S. Dist. LEXIS 16873, at *5-6 (D.D.C. July 11, 2005) (*Maynor I* "merely declared" that the Lumbee Act "did not . . . preclude the 22 recognized individuals from receiving benefits under the IRA as previously determined. . . . It merely affirmed the 22 individuals' status as Indians entitled to benefits conferred by the IRA."), *aff'd*, 2006 U.S. App. LEXIS 3276 (D.C. Cir. Feb. 9, 2006). Whether or not *Maynor I* might have some relevance beyond the 22 plaintiffs, the facts in that case are distinguishable from Appellant's case, and we are not convinced that *Maynor I* can aid Appellant.

In our view, to accept Appellant's arguments would effectively negate the prohibitory language of the Act. The IRA is a statute that "affect[s] Indians because of their status as Indians," and thus, by the language of the Lumbee Act, the IRA is inapplicable to Lumbee Indians. As *Maynor I* recognized, the Act did not intend to divest individuals who had been certified as "Indians" under the IRA before they became Lumbee Indians of their pre-existing status. Appellant was born well after the Act, as a Lumbee Indian. Whatever rights may have attached under the IRA, before enactment of the Lumbee Act, to individuals with one-half or more Indian blood of the Siouan Indians of Robeson County, did not attach to Appellant. The prohibition in the Lumbee Act has always applied to her, and serves as a threshold barrier to obtaining IRA benefits, regardless of whether, in the absence of the Act, she would qualify under 25 C.F.R. § 5.1(c) based on Indian blood quantum.[8] Thus, she is ineligible for Indian preference under the IRA, regardless of whether her blood quantum exceeds one-half Indian blood of the predecessor tribes of the Lumbee Indians.

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[8] As noted, in her application, Appellant claimed that her Indian blood quantum is derived from the Cheraw, Croatan, and Cherokee (or Tuscorora) tribes. *Compare* Mar. 21, 2012, Letter at 2 (AR Tab 7) *with* Application (AR Tab 8). In her reply brief, Appellant appears to single out descent from the "Cherokee Tribe" as sufficient to constitute her one-half degree Indian blood, Reply Br. at 4-5, but she does not explain how that would alter the applicability of the Lumbee Act to her. During the hearings on the Lumbee Act, it was clear that the Cherokee tribe was among the several tribes from whom the Indians of Robeson County claimed descent. Appellant does not claim Indian status based on membership in one of the Federally recognized Cherokee tribes, and thus we need not address whether such affiliation would make a difference.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Decision of the Regional Director.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge